IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

WILLIAM DOUGLAS ZWEIG, *et al.*, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	Cause No.: 08SL-CC03051
vs.	)	
THE METROPOLITAN ST. LOUIS SEWER DISTRICT,	)	Transferred by Order of the Mo. Sup. Ct. to the Hon. Dan Dildine
Defendant.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT AND DECREE

Cause was called for trial on April 13, 2010 and continued day to day through April 16, 2010. Plaintiff, Dr. William Douglas Zweig and Dr. David L. Milberg appeared in person, and all Plaintiffs appeared by counsel, Richard R. Hardcastle III, George A. Uhl, Kirsten M. Ahmad, and Dianna R. Reed. Defendant, The Metropolitan St. Louis Sewer District (hereinafter referred to as "MSD"), appeared by and through its counsel, John Gianoulakis, Robert F. Murray, and Kevin Anthony Sullivan.

Upon conclusion of the evidence on April 16, 2010, the parties were granted 30 days to file post-trial briefs. Closing arguments were scheduled for 1:30 pm on June 21, 2010, and were presented that date. This Court, being duly advised in the premises, makes the following Findings of Fact, Conclusions of Law, and Judgment and Decree pursuant to Mo. Sup. Ct. Rule 73.01(c).

FINDINGS OF FACT

I. Nature of Action and Procedural History

1. This is a civil class action concerning a "Stormwater User Charge," as defined in Ordinance Nos. 12560, 12789, 12906 and 13022 (the "Stormwater User Charge"), imposed by

The Metropolitan St. Louis Sewer District ("MSD" or the "District") on all properties with impervious surface area that are located within the geographical boundaries of the District. (Pls' Tr. Ex. 48 (Joint Stipulation), ¶¶ 11, 13; Plaintiffs' Second Amended Petition ("Sec. Am. Pet."), ¶¶ 1, 14; MSD's Answer and Affirmative Defenses to Plaintiffs' Second Amended Petition ("MSD Answer"), ¶ 14.)

2. This lawsuit was initially filed on July 18, 2008, and Plaintiffs filed their Second Amended Petition on July 24, 2009. (Original Petition; Sec. Am. Pet.)

3. Plaintiffs seek relief against MSD under only one legal theory – that MSD's imposition and collection of its Stormwater User Charge violates the Hancock Amendment, Article X, Section 22(a) of the Missouri Constitution for two reasons: (i) despite its label as a "user charge," the Stormwater User Charge is in fact a "tax, license or fee" that MSD was required to submit to a District-wide vote before imposing it on District property owners; and (ii) the Stormwater User Charge unlawfully broadened the base of MSD's existing stormwater "tax, license or fee" program without reducing the rate to yield the same revenue as on the prior base. (See generally Sec. Am. Pet.)

4. Plaintiffs request the following relief:

1.) an Order and declaratory judgment that the Stormwater User Charge is unconstitutional because it violates Article X, Section 22(a) of the Hancock Amendment (Sec. Am. Pet., ¶¶ 2, 37-64, Prayer for Relief, pp. 17-18);

2.) an Order enjoining MSD from imposing its unconstitutional Stormwater User Charge on Plaintiffs and the Class unless and until it is approved by a majority of the qualified voters, and from spending the Stormwater User Charge funds it already has unlawfully collected (subsections 1 and 2 are hereinafter referred to collectively as the "Hancock Claims") (Id.);

3.) an Order requiring MSD to refund to Plaintiffs and the Class all Stormwater Charges collected under the Stormwater Ordinances (hereinafter, the "Refund Claims") (Id.); and

4.) an Order awarding to Plaintiffs and the Class of their reasonable attorneys' fees and litigation expenses, as provided under Article X, Section 23 of the Missouri Constitution. (Id.)

5. On March 13, 2009, Plaintiffs filed a Motion for Class Certification and a Memorandum of Law in support thereof. (Plaintiff's Motion for Class Certification Pursuant to Supreme Court Rule 52.08 and Memorandum in Support thereof.)

6. This Court held a hearing on Plaintiffs' Motion for Class Certification on October 5, 2009. At that time, Plaintiffs and MSD submitted a Joint Stipulation Regarding the Motion for Class Certification and Sequence of Proceedings, in which the parties agreed that it was appropriate to certify a class for purposes of adjudicating Plaintiffs' Hancock Claims, and further that the Court should bifurcate the action and try the Hancock Claims first, and in the event the Court finds in favor of Plaintiffs on their Hancock Claims, this Court would proceed forward and adjudicate Plaintiffs' Refund Claims. (Pls' Tr. Ex. 48 (Joint Stipulation), ¶¶ 1, 20-23, 25-27.)

7. On October 8, 2009, after considering the Joint Stipulation, as well as the evidence, deposition testimony and materials submitted by the parties at the hearing, this Court granted Plaintiffs' motion to certify this case as a class action under Rule 52.08 for the sole purpose of adjudicating the Hancock Claims in the Second Amended Petition ("Hancock Class"). (See Findings of Fact, Conclusions of Law and Order Certifying the Hancock Class and Bifurcating Proceedings ("Order").) The Court appointed Plaintiffs as Hancock Class representatives, and certified a Hancock Class consisting of: "All persons or entities charged the Stormwater User Charge by the Metropolitan St. Louis Sewer District under MSD Ordinance Nos. 12560 and 12789, and any subsequently adopted Stormwater User Charge Ordinance, from March 2008 through the date of final judgment." (Order, at p. 1, p. 2 ¶¶ A-B.) The Court made no ruling on whether class certification is appropriate on the Refund Claims, and the Court bifurcated the proceedings so that the Hancock Class would thereafter proceed to trial on the

merits of their Hancock Claims only. (Order, at ¶¶ E-F.) The Court ordered that the Refund Claims will not be adjudicated unless and until a judgment or order is entered in favor of the Hancock Class on the Hancock Claims. (Order, at ¶ H.)

II. The Parties

8. Defendant MSD is a body corporate, municipal corporation and political subdivision of the State of Missouri, established as a metropolitan sewer district under the provisions of Article VI, Section 30 of the Missouri Constitution, pursuant to a Charter Plan (the "Charter") adopted by the voters of the City of St. Louis and St. Louis County at a special election held on February 9, 1954. (Pls' Tr. Ex. 48 (Joint Stipulation), ¶ 2; Pls' Sec. Am. Pet. ¶ 7; MSD Answer, ¶ 7; Pls' Tr. Ex. 22 (MSD's Charter Plan).)

9. Under Article 2, Section 2.010 of MSD's Charter, the District boundaries include the entire City of St. Louis and most of St. Louis County. (Pls' Tr. Ex. 48 (Joint Stipulation), ¶ 3; Pls' Tr. Ex. 22 (MSD's Charter Plan), Art. 2, Sec. 2.010; Pls' Tr. Exs. 9-10 (MSD Ordinance Nos. 3205, 3239).)

10. Plaintiff Dr. William Douglas Zweig is an individual who resides in, and owns property located in, St. Louis County, Missouri, within the boundaries of the District as defined in Article 2, Section 2.010 of MSD's Charter. (Pls' Tr. Ex. 48 (Stipulation), ¶ 4; Pls' Tr. Ex. 22 (MSD's Charter Plan), Art. 2, Sec. 2.010.) Plaintiff Zweig is an "owner" and/or "user" of "property served" by MSD's "stormwater system" within the meaning of MSD Ordinance Nos. 12560, 12789, 12906 and 13022, upon whom MSD imposed its Stormwater User Charge from April, 2008 through August, 2009. (Pls' Tr. Exs. 2-5 (MSD Ordinance Nos. 12560, 12789, 12906 and 13022), Sections One and Twelve; Pls' Tr. Ex. 48 (Stipulation), ¶¶ 4, 14; Pls' Tr. Ex. 55 (Pl. Zweig's MSD Bills), Z001-Z0024.)

11. Plaintiff Dr. David L. Milberg is an individual who resides in, and owns two properties in, St. Louis County, Missouri, within the boundaries of the District as defined in Article 2, Section 2.010 of MSD's Charter. (Pls' Tr. Ex. 48 (Stipulation), ¶ 5; Pls' Tr. Ex. 22 (MSD's Charter Plan), Art. 2, Sec. 2.010.) Plaintiff Milberg is an "owner" and/or "user" of two "properties served" by MSD's "stormwater system" within the meaning of MSD Ordinance Nos. 12560, 12789, 12906 and 13022. (Pls' Tr. Exs. 2-5 (MSD Ordinance Nos. 12560, 12789, 12906 and 13022), Sections One and Twelve; Pls' Tr. Ex. 48 (Stipulation), ¶¶ 5, 14; Pls' Tr. Exs. 57-59 (Pl. Milberg's MSD Bills).) MSD imposed its Stormwater User Charge on Plaintiff Milberg for his residential property from March, 2008 through August, 2009. (Pls' Tr. Exs. 58-59 (Pl. Milberg's MSD Bills).) MSD has imposed its Stormwater User Charge on Plaintiff Milberg for his commercial property since March, 2008. (Pls' Tr. Ex. 57 (Pl. Milberg's MSD Bills and Canceled Checks).)

12. Plaintiff Mark R. Kurz is an individual who resides in, and owns property in, St. Louis County, Missouri, within the boundaries of the District as defined in Article 2, Section 2.010 of MSD's Charter. (Pls' Tr. Ex. 48 (Stipulation), ¶ 6; Pls' Tr. Ex. 22 (MSD's Charter Plan), Art. 2, Sec. 2.010; Pls' Tr. Ex. 76 (Depo. Desig. of Pl. Kurz), at 5:15-19; 11:18-12:10; 13:14-24.) Plaintiff Kurz is an "owner" and/or "user" of "property served" by MSD's "stormwater system" within the meaning of MSD Ordinance Nos. 12560, 12789, 12906 and 13022 upon whom MSD has imposed its Stormwater User Charge since March, 2008. (Pls' Tr. Exs. 2-5 (MSD Ordinance Nos. 12560, 12789, 12906 and 13022), Sections One and Twelve; Pls' Tr. Ex. 48 (Stipulation), ¶¶ 6, 14.)

13. Plaintiffs Zweig, Milberg and Kurz each have been billed Stormwater User Charges by MSD. (Pls' Tr. Ex. 48 (Joint Stipulation), ¶¶ 4-6, 14; Pls' Tr. Ex. 22 (MSD's Charter Plan), Art. 2, Sec. 2.010; Pls' Tr. Ex. 55 (Pl. Zweig's MSD Bills); Pls' Tr. Exs. 57-59 (Pl.

Milberg's MSD Bills); Pls' Tr. Ex. 76 (Depo. Desig. of Pl. Kurz), at 5:15-19; 11:18-12:10; 13:14-24.)

14. Plaintiffs Zweig and Kurz each have paid all of the Stormwater User Charges charged them by MSD. (Pls' Tr. Ex. 48 (Joint Stipulation), ¶ 15; Pls' Tr. Ex. 55, at Z0020-Z0024; Pls' Tr. Ex. 35; Pls' Tr. Ex. 76 (Depo. Desig. of Pl. Kurz), at 58:12-17.) Plaintiff Milberg testified at trial that he has paid all of the Stormwater User Charges charged him by MSD in connection with his commercial property, but has not paid the Stormwater User Charges charged him by MSD in connection with his residential property. (Pls' Tr. Ex. 48 (Joint Stipulation), ¶ 15; Pls' Tr. Exs. 57-59.)

III. MSD's Stormwater Services and Stormwater Charges

15. Since its formation in 1954, pursuant to Section 3.010 of its Charter, MSD has been mandated to exercise complete "title, jurisdiction, control, possession and supervision" of the stormwater systems within its boundaries. (Pls' Tr. Ex. 22 (MSD's Charter Plan), § 3.010.)

16. In 1954, MSD's Charter provided that the District boundaries included the entire City of St. Louis and a large portion of St. Louis County, roughly extending to or beyond Lindbergh Road (the "Original Boundaries"). (Pls' Tr. Ex. 22 (MSD's Charter Plan), Article 2.)

17. Under Resolution No. 65 adopted by the MSD Board of Trustees on May 21, 1956, MSD "accepted the maintenance and operation of the portion of the [s]tormwater [s]ystem theretofore operated and maintained by the municipalities, sewer districts, and other public agencies within the [Original] [B]oundaries of the District." (Pls' Tr. Exs. 2-5 (Recitals to MSD Ordinance Nos. 12560, 12789, 12906 and 13022).)

18. Nearly all of the remaining portions of St. Louis County were later annexed to the District pursuant to an annexation election held on May 10, 1977 (the "Annexed Area"). (Pls' Tr. Exs. 2-5 (Recitals to MSD Ordinance Nos. 12560, 12789, 12906 and 13022).)

19. By Ordinance No. 7691, adopted by the MSD Board of Trustees on February 22, 1989, MSD accepted responsibility for the construction, operation and maintenance of stormwater and drainage facilities over the *entire* district. (Pls' Tr. Ex. 33 ("Stormwater Funding"), at MSD 4169; (Pls' Tr. Exs. 2-5 (Recitals to MSD Ordinance Nos. 12560, 12789, 12906 and 13022).)

A. MSD's Stormwater Funding History

20. Prior to MSD's December 2007 enactment of the Stormwater Ordinances at issue in this case, MSD funded the operation and maintenance of its stormwater and drainage facilities through the imposition of the following taxes on District property owners:

1. Prior to the enactment of the Hancock Amendment in 1980, all properties within the District were assessed an administrative tax at a rate of $0.02 per $100 of assessed property valuation, and all properties within the Original Boundaries were assessed stormwater operation and maintenance taxes at a rate of $0.05 per $100 of assessed property valuation. (MSD's Answer, ¶ 28; Pls' Tr. Ex. 33 ("Stormwater Funding"), at MSD 4170; Pls' Tr. Ex. 79 (Depo. Desig. of Janice Zimmerman), at 24:22-25:12.)

2. Beginning in approximately 1988, MSD charged each of its customers connected to its wastewater system a $0.24 per month flat stormwater charge. Pursuant to the Hancock Amendment, this $0.24 flat charge was submitted to a District-wide vote, and it was approved by a majority of the voters in March of 1988. (Pls' Tr. Ex. 8 (MSD Ordinance 7358); Pls' Tr. Ex. 1 (MSD Ordinance 7428); Pls' Tr. Ex. 6 (MSD Ordinance 9030); Pls' Tr. Ex. 7 (MSD Ordinance 9183); Pls' Tr. Ex. 79 (Depo. Desig. of Janice Zimmerman), at 24:22-25:12.)

3. Due to their unique stormwater needs, MSD assessed additional taxes at varying rates up to $0.10 per $100 of assessed property valuation in 21 different subdistricts (to be used exclusively to fund stormwater projects in each subdistrict). These property taxes were submitted to and approved by the voters in each subdistrict. (MSD's Answer, ¶ 28; Ex. 33 ("Stormwater Funding"), at MSD 4170; Pls' Tr. Ex. 79 (Depo. Desig. of Janice Zimmerman), at 24:22-25:12; 28:19-31:21.)

21. MSD did not collect any stormwater taxes from non-profit or tax-exempt entities under its prior funding program. (Pls. Tr. Ex. 79 (Depo. Desig. of Janice Zimmerman), 169:6-170:14 and 164:19-169:5 (background).)

22. The prior funding program discussed in Paragraphs 20 to 21 above resulted in revenue of approximately $21 to $22 million annually. (Pls' Tr. Ex. 79 (Depo. Desig. of Janice Zimmerman), 40:16-25; 41:6-18; 42:18-43:4; Pls' Tr. Ex. 18 (MSD Wastewater and Stormwater Rate Proposal), at MSD 2128-2129 (MSD 2128 line 5 plus MSD 2129 line 22), MSD 2141 (Table 4-8, total of lines 1, 3, 4 and 19 minus line 14).)

23. The voter-approved tax portion of the program – the $.24 flat stormwater charge – resulted in only $1.2 million of the $21 to $22 million in stormwater funds generated annually under this program. (Pls' Tr. Ex. 18 (MSD Wastewater and Stormwater Rate Proposal), at MSD 2128 (line 1).)

B. MSD's Replacement of its Prior Tax-Based Stormwater Funding Program With its New Stormwater User Charge

24. In the early 1990's, MSD finding that the waste water fees were providing insufficient funds to adequately operate the storm water system, began a rate study. A determination was made that a fee structure would be adopted without the necessity of a vote. The new fee structure would allow for an increase in annual revenue from approximately $21 million to $80 million dollars over a period of a few years.

25. After a period of study and consideration, MSD, arrived at a fee system whereby properties with impervious area would be billed at a rate (their pro rata share) to provide MSD with a sum of money that MSD deemed necessary or desirable for its annual budget.

26. MSD, in attempting to structure a billing system in compliance with the Keller factors, began with the proposition that water running off of unimproved property does not necessitate a stormwater system, but water running off of impervious area does. Working from the premise that only impervious area creates a need for a stormwater system, calculations, measurements, etc., were made of the properties within the district, and a fee structure based on square footage of impervious area was arrived at.

27. To avoid blanket billing, a number of parcels were excluded, based on their not having impervious area. MSD states that if property were in its natural state, there would be no need for a stormwater system. However, MSD's evidence established that MSD works to maintain natural areas such as creeks and small rivers, as part of its system. In addition, per MSD, properties where the water runs off of unimproved property apparently, do not generate the need for MSD's services as to education, enforcement, etc., which MSD considers necessary for its base charges. This Court finds that the improved area that already exists (and as it existed in 1954) has created the need for the stormwater system. (See paragraph 52 herein)

28. Without going to the District voters for approval, on December 13, 2007, MSD's Board of Trustees approved Ordinance No. 12560, effective March 1, 2008, which repealed the voter-approved $0.24 flat charge and replaced it with a monthly Stormwater User Charge imposed on every property in the District with impervious surface area at a rate of $0.12 per every one hundred square feet of impervious surface area of the property.[1] (See Pls' Tr. Ex. 48 (Joint Stipulation), ¶¶ 8, 12; Pls' Tr. Ex. 5 (MSD Ordinance 12560), at p. 1 (repealing MSD Ordinance Nos. 8657, 9030 and 9183), 13 (setting forth effective date).)

29. At the same time, MSD decreased the *ad valorem* tax portion of the old stormwater funding program to zero. (Pls' Tr. Ex. 83.) As MSD's Director of Finance, Janice Zimmerman, testified at trial, MSD did not repeal the *ad valorem* taxes because MSD was aware of the calculated risk it took in enacting the Stormwater User Charge without a public vote, and

[1] Under the Stormwater Ordinances, the definition of "impervious surface area" of a property includes "those portions of [p]roperty which have been altered from its natural state by the addition to or construction thereon of any hard surfaced area which prevents or retards the entry of water into the soil in the manner and to the extent that such water entered the soil under natural conditions pre-existent to development, or which causes water to run off the surface in greater quantities or at an increased rate of flow than was present under natural conditions pre-existent to development." (See Pls' Tr. Ex. 2-5 (MSD Ordinance Nos. 12560, 12789, 12906 and 13022), Section One.) In other words, impervious areas include a property owner's home or buildings, concrete patios, driveways, walkways, parking lots or other similar structures. (Id.)

wanted to make sure it could "restore this funding should MSD be sued." (See also Pls' Tr. Ex. 83.)

30. On December 11, 2008, MSD's Board of Trustees approved Ordinance No. 12789, which is identical in all material aspects to Ordinance No. 12560, but increased the monthly Stormwater User Charge to $0.14 per every one hundred square feet of impervious surface area.[2] (Pls' Tr. Ex. 4 (MSD Ordinance No. 12906); Pls' Tr. Ex. 48 (Joint Stipulation), ¶ 11.)

31. During the first full fiscal year (July 1, 2008 through June 30, 2009) of its assessment, the new Stormwater User Charge resulted in revenue of approximately $41 million to MSD – almost doubling the amount of revenue MSD received under its prior stormwater funding program. (Pls' Tr. Ex. 79 (Depo. Desig. of Zimmerman), at 218:11-219:9; Pls' Tr. Ex. 25 (FY 2010 Strategic Business and Operating Plan), p. 28 (Stormwater User Charges, Forecast 2008-2009); Theerman Cross-Exam., 77:19-78:1.)

32. MSD's Executive Director, Jeffrey Theerman, testified at trial that MSD intends to periodically raise the rate until it reaches $0.29 per one hundred square feet of impervious surface area in approximately 2014. (Theerman Cross-Exam., 78:2-6; see also Pls' Tr. Ex. 26 (MSD Proposed Rate Change), at p. 10, 13 (Table D – Impact on Stormwater Rates – see Alt III).)

33. MSD's Executive Director and Director of Finance testified that when the impervious rate is fully implemented (as planned by MSD) and the Stormwater User Charge is $0.29 per one hundred square feet of impervious area in 2014, it will result in annual revenue of

[2] MSD subsequently enacted Ordinance No. 12906 on June 11, 2009, which is identical in all material aspects to Ordinance Nos. 12560 and 12789, but established a new late payment charge rate. (Pls' Tr. Ex. 4 (MSD Ordinance No. 12906); Pls' Tr. Ex. 48 (Joint Stipulation), ¶ 11.) On January 14, 2010, MSD enacted Ordinance No. 13022. (Pls' Tr. Ex. 2 (MSD Ordinance 13022).) Ordinance No. 13022 is identical in all material aspects to Ordinance Nos. 12560, 12789 and 12906, but added a new section regarding billing. (Id.) Ordinance Nos. 12560, 12789, 12906 and 13022 are referred to herein collectively as the "Stormwater Ordinances."

approximately $81 million to MSD – a fourfold increase from the amount of revenue MSD received under the prior funding program. (Theerman Cross-Exam., 78:2-11; see also Pls' Tr. Ex. 27, at MSD 4434 (line no. 2 at 2014).)

34. In addition to meeting the Keller factors, MSD's position was that the use of its impervious area formula for billing recommended by its Rate Commissioner, was fair, reasonable, commonly used and there have been an insignificant number of complaints regarding this system of billing, or the amount of the bills.

35. MSD has never submitted the Stormwater User Charge or any of the ordinances authorizing imposition of such charge to a vote of the qualified voters of the District. (Pls' Tr. Ex. 48 (Joint Stipulation), ¶ 12.)

36. MSD is not regulated or governed by any body of publicly elected officials. If taxpayers in the District disapprove of MSD's decision to impose an increased stormwater charge upon them, there is no mechanism by which the taxpayers can vote to remove MSD's management. (See generally Pls' Tr. Ex. 22 (MSD's Charter Plan); Theerman Cross-Exam., at 78:13-79:15.)

37. MSD's Stormwater Ordinances do not provide any administrative mechanism by which taxpayers can appeal the Stormwater User Charge to MSD and avoid paying the charge entirely. Section Twenty-Two of the Stormwater Ordinances provides that "[a]ny Person who considers the Stormwater User Charges billed to such Person pursuant to the provisions of this ordinance to be illegal, inaccurate or erroneous, *whether to the impervious area calculated or as to whether or not a credit should be applied* may request a review thereof by the Director of Finance or his designate." (Pls' Tr. Exs. 2-5 (MSD Ord. No. 12560, 12789, 12906 and 13022) (emphasis added).) The "Credit Policy" set forth in Section Twenty-Seven of the Stormwater Ordinances provides that under certain circumstances, an individual may receive a credit of 50%

of the Stormwater User Charge; yet, under the plain text of the Ordinance, such an individual cannot completely avoid the charge. (Id.; Pls' Tr. Ex. 80 (1/19/10 Hoelscher Dep.), 33:10-12.) MSD's Stormwater Ordinances also do not provide any mechanism by which a taxpayer can appeal the constitutionality of the Stormwater User Charge to MSD.

C. Consequences of Failure to Pay the Stormwater User Charge

38. Under the Stormwater Ordinances, failure to pay the Stormwater User Charge results in a lien against real property by operation of law, which lien "has the same priority as taxes levied for state and county purposes." (See Pls' Tr. Exs. 2-5 (MSD Ordinance Nos. 12560, 12789, 12906 and 13022), Section Fourteen; Theerman Cross-Exam., 79:11-15.)

D. Keller Factor 1: When is the fee paid?

39. Under the Stormwater Ordinances, MSD charges its Stormwater User Charge to District property owners on a periodic – monthly – basis. (Pls' Tr. Exs. 2-5 (MSD Ordinance Nos. 12560, 12789, 12906 and 13022, Section Twelve; Pls' Tr. Ex. 75 (6/18/09 Hoelscher Dep.), 76:21-23.)

40. The Stormwater User Charge is not based on the provision of a service that property owners may accept, reject, or use on a limited basis. Plaintiffs Zweig and Milberg testified that unlike other utilities, they cannot "shut off" or otherwise reduce their use of MSD's stormwater services (absent taking impractical measures like tearing out their driveways or removing their roofs), since the Stormwater User Charge is not based on their actual use of MSD's stormwater system during any monthly billing period. MSD's corporate representative acknowledged that a fee payer cannot opt out of MSD's stormwater services. (Pls' Tr. Ex. 80 (1/19/10 Hoelscher Dep.) 33:10-12.)

41. Removing all impervious surfaces wouldn't prevent use of MSD's stormwater system, but would remove the property from those assessed the fee.

42. Plaintiffs' expert witness, Professor Thomas Debo, testified based on his review of data from the U.S. Weather Service that rainfall varies in St. Louis from one month to the next on a magnitude of two to ten inches, but MSD's Stormwater User Charge does not vary from month to month.

43. Plaintiffs Zweig and Milberg testified that their Stormwater User Charge bills do not vary from month to month based on their actual use of MSD's stormwater services, and that their charge is not affected by the amount of rainfall or runoff from their properties during any monthly period.

44. Plaintiffs Zweig and Milberg testified that MSD does not identify on their bills what specific stormwater services (or amount of services) it provided to them in the prior month for the charge on their monthly bill.

45. It would be impractical, if not impossible for MSD to determine the amount of runoff from given properties. However, MSD can tell a landowner in January of a given year, the amount of his December bill, if the amount of impervious area does not change.

46. MSD's executive staff testified that the Stormwater User Charge billed to each fee payer is simply an apportionment (based on impervious surface area of an individual's property) of MSD's total annual costs relating to its stormwater system, and is not in any way based on the actual services MSD provides to a fee payer during any given month. (Pls' Tr. Ex. 80 (1/19/10 Hoelscher Dep.), 69:16-70:11; 96:16-97:9; 99:8-24; 134:6-230; (1/24/10 Hoelscher Dep., 139:4-140:13; 167:7-18; 168:5-11.) The annual cost is a number determined by the Board based on what MSD should accomplish in a given year. In addition to basic maintenance of a stormwater system, MSD has identified a long list of potential projects.

47. MSD's Director of Engineering and corporate representative, Brian Hoelscher, testified that MSD does not identify the services it provides to a particular fee payer for the

monthly Stormwater User Charge bill it sends to them, and further that he would not know how to go about making such a determination. (Pls' Tr. Ex. 80 (1/24/10 Hoelscher Dep.), 167:7-18; 168:5-11.)

48. MSD's Executive Director and corporate representative both testified that when MSD bills a fee payer for Stormwater User Charges, it does not attempt to determine the amount of stormwater services the fee payer used during the prior month. (Theerman Cross-Exam., at 52:8-13; Pls' Ex. 80 (1/19/10 Hoelscher Dep.), 96:16-97:9; 99:8-24.)

49. MSD's expert witness and corporate representative both testified that although MSD's costs of providing its stormwater services vary from month to month, MSD's monthly bill to the fee payer does not vary, and that the charge bears no relation to the amount of rainfall on the fee payer's property in a given month. (Pls' Ex. 80 (1/24/10 Hoelscher Dep.), 129:23-131:17; 137:4-22; 240:21-241:6.)

50. Mr. Sedgwick also testified that the Stormwater User Charge is not designed to measure MSD's cost of providing stormwater services to any particular individual property.

E. Keller Factor 2: Who pays the fee?

51. MSD charges its Stormwater User Charge to every resident owning property in the District with impervious surface area, regardless of whether runoff from the property actually drains into MSD's stormwater system. (See Pls' Tr. Exs. 2-5 (MSD Ordinance Nos. 12560, 12789, 12906 and 13022), Sections Two, Eight, and Twenty-Seven.) Under the plain language of the Stormwater Ordinances, MSD imposes its Stormwater User Charge on property that does not drain into MSD's stormwater system because it, among other things, (i) drains internally resulting in no stormwater runoff to MSD's stormwater system; (ii) drains directly to the Mississippi, Missouri, or Meramec Rivers without the use of MSD's stormwater system; and/or (iii) drains into a stormwater system which is wholly or partially maintained by another entity

such as a levee district under an agreement with MSD. (Id. at Section Twenty-Seven.) Individuals whose property does not drain into the MSD stormwater system as outlined in subsections (i), (ii) and (iii) above may apply for a credit of up to fifty percent, but MSD still imposes a Stormwater User Charge on these properties. (Id.)

52. Landowner's, with no impervious area pay nothing, though presumably they would benefit by Defendant's services, at least equivalent to 50% benefit, as do the properties that drain internally, directly into rivers, etc..

53. On August 28, 2009, the Missouri General Assembly enacted House Bill 661, which is codified in Mo. Rev. Stat. § 204.700. It provides as follows:

> No person who owns real property that is used for residential purposes within the boundaries of any district created under section 30 of article VI of the Missouri Constitution shall be assessed any fee, charge, or tax for storm water management services if the district does not directly provide sanitary sewer services to such property and if the storm water runoff from such person's property does not flow, or is not otherwise conveyed, to a sewer maintained by such district.

54. Based on its interpretation of § 204.700 RSMo., beginning on or after August 28, 2009, MSD ceased charging its Stormwater User Charge to approximately 3,600 (out of the approximately 500,000) properties served by the District, including Zweig's property and Milberg's residential property. (See Pls' Tr. Ex. 41 (Letter from MSD Exec. Dir. to Mo. DNR, dated Aug. 31, 2009).) However, from March 1, 2008, the effective date of MSD Ordinance No. 12560, to August 28, 2009, the date of enactment of House Bill 661, MSD **did** charge a Stormwater User Charge to these properties. (Pls' Tr. Exs. 2-3 (MSD Ordinance Nos. 12560 and 12789, Sections One and Twelve; Pls' Tr. Ex. 48 (Stipulation), ¶¶ 4, 14; Pls' Tr. Ex. 55 (Pl. Zweig's MSD Bills); Pls' Tr. Exs. 58-59 (Pl. Milberg's residential MSD Bills).)

55. By its plain language, H.B. 661 only affects properties to which MSD does not provide **sanitary sewer service.** Thus, even after the enactment of H.B. 661, MSD continues to

charge its Stormwater User Charge to properties with runoff that does not drain into MSD's stormwater system, so long as it provides sanitary sewer service to those properties. (See Mo. Rev. Stat. § 204.700.)

F. Keller Factor 3: Is the Amount of the Fee to be Paid Directly Affected By the Level of Goods or Services Provided to the Fee Payer?

56. The primary service that MSD offers to a fee payer is the handling of stormwater runoff from that fee payer's property. (Pls' Tr. Ex. 44, at 19:15-20, 79:24-80:6; Pls' Tr. Ex. 45, at 145.)

57. MSD's Stormwater User Charge charges for MSD's stormwater service based upon the amount of impervious area on each property within the District. (Pls' Tr. Exs. 2-5 (MSD Ordinance Nos. 12560, 12789, 12906 and 13022).)

58. The assumption underlying MSD's Stormwater User Charge is that there is a direct relationship between the impervious area (development) of a property and the stormwater runoff from that property that enters into MSD's stormwater system and is managed by MSD. (Pls' Tr. Ex. 19, at 1.1, 1.2, 4.1, 4.4.2; Pls' Tr. Ex. 38, at 20; Pls' Tr. Ex. 44, at 19:15-20, 79:24-80:6; Pls' Tr. Ex. 45, at 84, 135, 145.)

59. Plaintiffs retained two experts in the fields of hydrology and hydraulics – Thomas Debo and Jonathan Jones – to evaluate, test, and offer their professional opinions on the issue of whether impervious surface area on a property bears a direct relationship to runoff from that property.

60. At trial, Professor Debo testified that impervious area is just one of many factors that influence stormwater runoff from a given parcel or property. He testified that numerous other factors, including drainage area, slope, roughness, storage, drainage density, channel length, antecedent moisture and land use, also affect runoff. (Pls' Tr. Ex. 66-17; see also Pls' Tr. Ex. 66-18 to 66-23.) Professor Debo testified that impervious area is not the driving factor in

measuring stormwater runoff; rather, the most important factor considered by urban hydrologists in measuring stormwater runoff is the total lot size of a property. Professor Debo also testified that that since the type of soil found on most properties in St. Louis allows for very little water penetration, increasing impervious area on properties in St. Louis has very little impact on stormwater runoff.

61. Professor Debo testified that he performed several stormwater runoff calculations using data for hypothetical sites, in order to evaluate the relationship between runoff and impervious area on those sites. To determine the impact of only impervious area on stormwater runoff, Professor Debo kept all of the other factors in the equation – such as soil type, ground cover, slope, etc. – the same. The results of the calculations demonstrated that where the impervious area at the site was doubled, quadrupled or increased by a factor of six, the stormwater runoff did not increase correspondingly (as MSD's Stormwater User Charge assumes). Based on these results, Professor Debo opined to a reasonable degree of engineering certainty that there is **not** a direct relationship between impervious area and stormwater runoff.

62. Professor Debo also opined to a reasonable degree of engineering certainty that impervious area does not cause or bear a direct relationship to pollutants on a given property; rather, the amount of individual pollutant contribution is based on the individual's activities on the property. (Pls' Tr. Ex. 66-8.)

63. Plaintiffs' expert witness Jonathan Jones testified that in order to test MSD's assumption that there is a direct relationship between impervious area on a property and stormwater runoff, he performed a three-phase field analysis of properties within MSD's District. Using actual data obtained from the field surveys, Mr. Jones selected several properties within MSD's service area, each with approximately the same amount of impervious area, and performed several stormwater runoff calculations to evaluate whether (as MSD's Stormwater

User Charge assumes) properties having approximately the same amount of impervious area would generate approximately the same amount of stormwater runoff. The results demonstrated that the stormwater runoff volumes for the selected properties varied substantially, ranging from 1,069 cubic ft. of runoff to 5,022 cubic ft. for a 2-year rainfall event, and ranging from 2,802 cubic ft. to 33,992 cubic ft for a 100-year rainfall event. Mr. Jones also testified that when an undeveloped property was evaluated along with the selected impervious properties, the results showed that the stormwater runoff from the undeveloped property exceeded the runoff of two of the properties with impervious area. Based on these calculations, Mr. Jones opined to a reasonable degree of engineering certainty that there is **not** a direct relationship between impervious area and stormwater runoff to MSD's stormwater system. Mr. Jones also testified that there are a number of factors other than impervious area that have a substantial effect on stormwater runoff for properties in the St. Louis area, such as lot size, slope and the extent to which impervious area is connected vs. disconnected. (Pls' Tr. Ex. 72-14, 72-16, 72-18 to 72-21, 72-23, 72-25 to 72-27, 72-29.)

64. The conclusion of Plaintiffs' experts that there is not a direct relationship between impervious area and runoff was not challenged by MSD at trial.

65. MSD's corporate representative testified that MSD's use of impervious area to allocate its costs among fee payers may not have anything to do with the services each fee payer actually receives from MSD; it is simply an accounting function that provides a means to distribute MSD's costs. (Pls' Tr. Ex. 80 (1/19/10 Hoelscher Dep.), 69:16-70:11; 96:16-97:9; 99:8-24; 134:6-230; (1/24/10 Hoelscher Dep., 139:4-140:13; 167:7-18; 168:5-11.)

66. MSD's expert witness and corporate representative both testified that although there is a significant variance in rainfall in St. Louis from one month to the next, the amount of

the Stormwater User Charge remains the same no matter how much rain falls/runoff occurs on a property during a given month. (Pls' Tr. Ex. 75 (6/18/09 Hoelscher Dep.), 76:24-77:5.)

67. MSD's Executive Director and corporate representative testified that MSD does not measure the amount of stormwater services it provides to a specific property in determining the Stormwater User Charge, but rather bases the charge to each property owner on MSD's costs for the entire stormwater system. (Pls' Tr. Ex. 80 (1/19/10 Hoelscher Dep.), 69:16-70:11; 96:16-97:9; 99:8-24; 134:6-230; (1/24/10 Hoelscher Dep., 139:4-140:13; 167:7-18; 168:5-11; Theerman Cross-Exam., at 52:8-13.)

68. MSD's Executive Director testified that if a fee payer reduces stormwater runoff by installing a detention basin on his property, he receives no credit from MSD on his Stormwater User Charge bill. (Theerman Cross-Exam., at 29:8-13; see also 58:6-18.)

69. MSD's Executive Director and corporate representative testified that MSD's costs for its "base" services, which comprise 50% of the stormwater services it provides, do not vary from ratepayer to ratepayer based upon the amount of impervious area by virtue of one ratepayer having more impervious area than another; yet, all ratepayers are charged for these services based on their impervious area. (Theerman Cross-Exam., 49:4-14; 50:8-12; 50:16-24; 65:4-10; see also 50:16-24; Pls' Tr. Ex. 80 (1/24/10 Hoelscher Dep.), 186:12-187:7.)

G. Keller Factor 4: Is MSD Providing a Service or Good?

70. MSD's corporate representative testified that the Stormwater User Charge funds MSD's maintenance and operation of its stormwater system, and also funds MSD's compliance with applicable regulations and provision of education to District property owners regarding the mandates of the Clean Water Act. (Pls' Tr. Ex. 80 (1/19/10 Hoelscher Dep.), 69:16-70:1.)

71. Prior to MSD's enactment of the Stormwater Ordinances in 2007, MSD performed these same activities, and these activities were funded by taxes under a stormwater funding program that had been fully approved by the voters. (Pls' Tr. Ex. 33.)

72. The nature of MSD's stormwater services has changed little since it operated under its prior funding program. There was testimony that MSD would like to provide additional services, and has prepared a list of potential projects.

73. In addition, certain ratepayers are being charged Stormwater User Charges for services they do not receive. For example, MSD does not charge its Stormwater User Charge to owners of property containing no impervious surface area. If, however, that property owner later decides to develop the lot (i.e., construct an office building and parking lot), MSD's Design Requirements mandate that the new development must maintain pre-development stormwater runoff conditions. (See Pls' Tr. Ex. 49.) Although the property owner must incur the cost of constructing and maintaining a retention pond or some other type of stormwater management structure in order to comply with this mandate, (see, e.g., Pls' Tr. Ex. 72-12), the mere fact that the property contains impervious surface area after development will make the property owner subject to MSD's Stormwater User Charge. MSD's Stormwater Ordinances do not provide any credit on the Stormwater User Charge to such property owner for maintaining pre-development runoff conditions. Thus, the property owner, after construction, is now charged a Stormwater User Charge, despite the fact that such owner has not increased the stormwater runoff into MSD's stormwater system and receives no new stormwater services from MSD.

H. Keller Factor 5: Has The Activity Historically And Exclusively Been Provided By The Government?

74. MSD has historically been the exclusive provider of stormwater services. Since MSD was formed in 1954, pursuant to Section 3.010 of its Charter, MSD has been mandated to

exercise complete "title, jurisdiction, control, possession and supervision" of the stormwater systems within its boundaries. (Pls' Tr. Ex. 22 (MSD Charter), § 3.010.)

75. Under MSD Resolution No. 65 adopted by the MSD Board of Trustees in May of 1956, MSD "accepted the maintenance and operation of the portion of the [s]tormwater [s]ystem theretofore operated and maintained by the municipalities, sewer districts, and other public agencies within the [Original] [B]oundaries of the District." (See Pls' Tr. Exs. 2-5.) (See Pls' Tr. Exs. 2-5 (Recitals to MSD Ordinance Nos. 12560, 12789, 12906 and 13022).)

76. Additional areas were annexed to the District in May of 1977, and in February of 1989, MSD accepted responsibility for construction, operation and maintenance of stormwater and drainage facilities over the *entire* District. (Id.)

77. Neither MSD's corporate representative designated to testify on the subject nor MSD's expert witness were able to offer any evidence of any private entities having historically supplied stormwater services in the St. Louis metropolitan area (or anywhere in the State of Missouri). (Pls' Tr. Ex. 80 (1/19/10 Hoelscher Dep.), at 14:22-15:14; Pls' Tr. Ex. 54.)

78. When asked by MSD's counsel to offer an opinion on whether any private entities have ever provided such services to property owners in the St. Louis area for a fee, in a memorandum dated October 1, 2008, Mr. Sedgwick concluded that he could find none. (Pls' Tr. Ex. 54 ("10/1/08 Memorandum from Mr. Sedgwick to Mr. Murray) ("Private entity providing stormwater services and charging for services. The writer has reviewed the available references obtained by CDM and others and has not discovered a specific service provider that operates/maintains a stormwater system and charges a fee for service.").)

79. Plaintiffs' expert Thomas Debo also testified at trial that he is not aware of any private companies in St. Louis that provide stormwater services or other activities similar to the services provided by MSD to paying customers.

80. Developers within the Metropolitan Sewer District are required to construct stormwater structures, subject to MSD's approval, and maintain them until MSD deems them acceptable. There are also Developers/landowners who maintain retention ponds. These are not private provision of similar services as argued by MSD.

CONCLUSIONS OF LAW

The following Conclusions of Law may contain some Findings of Fact, which, though not delineated as such, should be accorded the same weight as those heretofore set forth.

81. This Court has jurisdiction over the parties and the subject matter involved in this action.

82. As a "political subdivision", MSD is subject to the provisions of Article X, Section 22(a) of the Hancock Amendment to the Missouri Constitution. Beatty v. Metropolitan St. Louis Sewer Dist., 867 S.W.2d 217, 219 (Mo. banc 1993) ("MSD is a political subdivision of the state.")

83. Plaintiffs Zweig, Milberg and Kurz are "taxpayers" within the meaning of Article X, Section 23 of the Missouri Constitution.

84. A justiciable controversy exists between Plaintiffs and the Hancock Class and Defendant MSD with respect to MSD's unconstitutional enactment of the Stormwater Ordinances and imposition of the Stormwater User Charge upon Plaintiffs and the Hancock Class. The rights, status and legal relations of Plaintiffs and the Hancock Class are affected by the enactment, imposition and application of the unconstitutional Stormwater Ordinances.

85. Accordingly, Plaintiffs and the Hancock Class have a right under Missouri Supreme Court Rules 87.02 through 87.10 and Mo. Rev. Stat. §§ 527.010 *et seq.* to obtain a declaration of their rights.

86. If this Court does not grant injunctive relief to Plaintiffs and the Hancock Class, MSD will continue to impose Stormwater User Charges on them and continue to spend the amounts it has unlawfully collected under the Stormwater Ordinances. Plaintiffs and the Hancock Class have no adequate remedy at law and face an imminent and continued threat of irreparable harm.

87. The Hancock Amendment to the Missouri Constitution, adopted on November 4, 1980, represents "the voters' basic distrust of the ability of representative government to keep its taxing and spending requirements in check. As an additional bulwark against local government abuse of its power to tax, the voters amended the constitution to guarantee themselves the right to approve increases in taxes proposed by political subdivisions of the state." Beatty v. Metropolitan St. Louis Sewer Dist., 867 S.W.2d 217, 221 (Mo. banc 1993). Thus, the Hancock Amendment was enacted to prevent political subdivisions from generating revenue in violation of the express will of the people. See Fort Zumwalt School. Dist. v. State, 896 S.W.2d 918, 921 (Mo. banc 1995) ("The Hancock Amendment 'aspires to erect a comprehensive, constitutionally-rooted shield . . . to protect taxpayers from government's ability to increase the tax burden above that borne by the taxpayers on November 4, 1980' unless a tax increase is approved by the voters.").

88. Article X, Section 22(a) of the Hancock Amendment to the Missouri Constitution prohibits a political subdivision of this state (i) from levying any tax, license or fee not authorized by law, charter or self-enforcing provision on the effective date of the Hancock Amendment – November 4, 1980, or (ii) from increasing the current levy of an existing tax, license, or fee above that current levy authorized by law or charter on November 4, 1980, without the approval of the required majority of the qualified voters of the political subdivision. Article X, Section 22(a) of the Missouri Constitution also prohibits a political subdivision

from broadening the base of an existing "tax, license or fee" without a corresponding reduction in the tax rate so that no additional revenues are generated by the tax or fee.

I. The Stormwater User Charge Bears All of the Characteristics of a Tax.

89. In its decision holding that not all fees imposed by a political subdivision are "taxes, licenses or fees" within the meaning of the Hancock Amendment, the Supreme Court in Keller concluded that "what is prohibited [under the Hancock Amendment] are fee increases that are taxes in everything but name." Keller, 820 S.W.2d at 303. While Keller provides tools for the Court to employ in determining whether the charge is a tax or a fee, common sense need not be set aside in the process. A "tax" as the term is commonly used, is a public burden imposed generally on the inhabitants of a whole state, or upon some civil division therefore, for governmental purposes, without reference to peculiar benefits to particular individuals or properties. See Black's Law Dictionary 1307 (5th ed. 1979). "Fees", on the other hand, are a charge for a particular act or service.

90. By its own admission, 50% of the stormwater services provided by MSD are "general benefits" to all District residents. (Theerman Cross-Exam., at 49:4-14; see also MSD Trial Br., at 31.) The public education, the permitting, the monitoring of the waterways as part of a plan to improve water quality – those are all services that are enjoyed equally by District residents – and if not enjoyed equally, their enjoyment is not determined by the amount of impervious area one resident has vs. another. This demonstrates that the Stormwater User Charge is a tax – not a "user fee."

91. With the enactment of the Stormwater User Charge, MSD replaced the *ad valorem* property tax and voter-approved $0.24 tax program by which it had funded its provision of stormwater services for over fifty years with a so-called "user fee". MSD offered no new services, just a new way to charge for the services, and charge significantly more for those

services, without putting the rate increase to the vote of the people. This is the type of tax increase disguised as a "user fee" that was the target of the Hancock Amendment. See Keller, 820 S.W.2d at 304n.4 and 305 ("The phrase 'license or fees' in § 22 indicates an intent to prevent political subdivisions from circumventing the Hancock Amendment by labeling a tax increase as a license or fee";"[i]n fact, the drafter's notes on § 22 emphasize that the purpose of the [phrase 'tax, license or fees'] was to prohibit the levy of new taxes or increasing the rate of an existing tax.").

92. Further supporting this conclusion is the fact that nonpayment of the Stormwater User Charge triggers a lien on an individual's property. In invalidating MSD's sewer service charges in Beatty, the Missouri Supreme Court found that the taxpayers' position on the Keller factors was strengthened "by the fact that unpaid sewer charges trigger a lien against real property by operation of law". Beatty, 867 S.W.2d at 221.

93. The Stormwater User Charge has all the badges of a tax.

II. Keller Factor Analysis

94. In Keller v. Marion County Ambulance District, 820 S.W.2d 301, 304 n.10 (Mo. banc 1991), the Missouri Supreme Court held that courts must consider five factors to determine whether a charge imposed upon taxpayers by a political subdivision is a "tax, license or fee" requiring voter approval under the Hancock Amendment.

95. To determine whether MSD's Stormwater User Charge is a "tax, license or fee" within the meaning of the Hancock Amendment, this Court must review each Keller factor individually and consider whether it weighs in favor of the Plaintiffs' position as a violation of the Hancock Amendment or MSD's position as a non-violation. Bldg. Owners & Managers Ass'n v. City of Kan. City, 231 S.W.3d 208, 212 (Mo. Ct. App. W.D. 2007); Avanti Petroleum v. St. Louis County, 974 S.W.2d 506 (Mo. Ct. App. E.D. 1998).

96. "[T]o determine if the fee assessed . . . is a "tax" requiring voter approval, [courts] look to the substance of the charges and disregard the label." Avanti Petroleum v. St. Louis County, 974 S.W.2d 506, 511 (Mo. Ct. App. 1998)

97. Since the Keller decision, Missouri courts have adopted a mathematical application of the Keller factors, finding that three or more of the five factors must weigh in favor of the political subdivision for the court to determine that the charge at issue is a "true user fee" not subject to the Hancock Amendment. See, e.g. Mo. Growth Ass'n v. Metropolitan St. Louis Sewer Dist., 941 S.W.2d 615, 624 (Mo. Ct. App. E.D. 1997).

98. The Supreme Court has held that "[w]here an application of the Keller factors creates genuine doubt as to whether the charges constitute a 'tax, license or fee' covered by the Hancock Amendment, we resolve the uncertainty in favor of requiring voter approval." Beatty v. Metropolitan St. Louis Sewer Dist., 867 S.W.2d 217, 221 (Mo. banc 1993). The practical effect of this statement is that, if the Keller factor calculus results in a "tie," the court must find in favor of the taxpayer. See, e.g., Beatty, 867 S.W.2d at 221 (where two factors weighed in favor of the taxpayer, two weighed in favor of the political subdivision, and one factor was inconclusive, the court found in favor of the taxpayer's position that the charge was a "tax" subject to the Hancock Amendment).

99. The Supreme Court also has held that the fact that a charge bears certain tax-like characteristics also may tip the scales in favor of the taxpayer. Id. at 221.

A. Keller Factor 1

100. The first Keller inquiry is: "When is the fee paid?" Keller, 820 S.W.2d at 304 n.10. "Fees subject to the Hancock Amendment are likely due to be paid on a periodic basis while fees not subject to the Hancock Amendment are likely due to be paid only on or after provision of a good or service to the individual paying the fee." Id.

101. The question posed under the first Keller test is "not whether the political subdivision provides a service but the regularity with which the fee is paid." Beatty v. Metro. St. Louis Sewer Dist., 867 S.W.2d 217, 220 (Mo. banc 1993) (explaining that a fee imposed on a quarterly basis is a "tax" under Keller factor one); see also Feese v. City of Lake Ozark, 893 S.W.2d 810 (Mo. banc 1995) (reaffirming its holding in Beatty); Building Owners & Managers Ass'n of Greater Kansas City v. City of Kansas City, 231 S.W.3d 208 (Mo. Ct. App. 2007) ("[T]he critical inquiry under this factor is . . . the regularity with which the fee is paid."); W. Dist. Ashworth v. City of Moberly, 53 S.W.3d 564, 575 (Mo. Ct. App. W.D. 2001) (finding that a fee charged on an annual basis is a "tax" under Keller factor one because "[t]he focus [ ] of the first factor is the regularity of payment of the fee by those required to pay it."); Avanti Petroleum v. St. Louis County, 974 S.W.2d 506, 511 (Mo. Ct. App. E.D. 1998) (explaining that an annual fee is a "tax" under Keller factor one).

102. Where the fee at issue is "not based on the provision of a service that [the fee payer] could accept, reject or use on a limited basis," the fee is subject to the Hancock Amendment under the first Keller test. Building Owners, 231 S.W.3d at 212.

103. In this case, it was undisputed that the Stormwater User Charge is imposed and paid on a periodic – monthly – basis. The record also demonstrates that the Stormwater User Charge is not based on the provision of a service that the fee payer can accept, reject or use on a limited basis. The fee is simply 1/12th of the fee payer's pro rata share of MSD's budget as determined by MSD annually. Therefore, this Court resolves the first Keller issue in favor of Plaintiffs.

B. Keller Factor 2

104. The second Keller inquiry is: "Who pays the fee?" Keller, 820 S.W.2d at 304 n.10. "Fees subject to the Hancock Amendment are likely to be blanket-billed to all or almost all

of the residents of the political subdivision while fees not subject to the Hancock Amendment are likely to be charged only to those who actually use the good or service for which the fee is charged." Id.

105. Fees are *not* blanket-billed where "only those persons who actually use [the political subdivision's] services pay the charge." Beatty, 867 S.W.2d at 220; see also Mo. Growth Ass'n v. Metropolitan St. Louis Sewer Dist., 941 S.W.2d 615, 623 (Mo. Ct. App. E.D. 1997).

106. In Feese v. City of Lake Ozark, 893 S.W.2d 810 (Mo. banc 1995), the Missouri Supreme Court has held that a charge *was* blanket-billed under Keller factor two where the monthly sewer service charges at issue were assessed against property that was not connected to the sewerage system.

107. The record in this case reveals that the Stormwater User Charge is imposed on properties that do not drain into MSD's stormwater system. These property owners are – in much the same manner as in Feese – not "connected to" MSD's stormwater system.

108. On the other hand, properties with no impervious area are not billed even when they drain into MSD's stormwater system. This exception seems only related to an attempt to comply with the Keller factors, by not billing everyone.

109. Therefore, the record demonstrates that the Stormwater User Charge is blanket-billed to almost all of the residents of the District, regardless of whether those properties actually use (i.e., have runoff that drains into) MSD's stormwater system. This Court resolves the second Keller factor in favor of Plaintiffs.

C. Keller Factor 3

110. The third Keller inquiry is: "Is the amount of the fee to be paid affected by the level of goods or services provided to the fee payer?" Keller, 820 S.W.2d at 304 n.10. "Fees

subject to the Hancock Amendment are less likely to be dependent on the level of goods or services provided to the fee payer while fees not subject to the Hancock Amendment are likely to be dependent on the level of goods or services provided to the fee payer." Id.

111. "Keller's third test focuses on the individual paying the fee." Beatty, 867 S.W.2d at 221. "In order for a governmental charge to appear to be a user fee under Keller's third criteria, the charge imposed must bear a **direct** relationship to the level of services a 'fee payer' actually receives from the political subdivision." Id. (emphasis in original).

112. As the primary service that MSD offers to a fee payer is the handling of stormwater runoff from that fee payer's property, and the Stormwater User Charge charges for that service based upon the amount of impervious area on each District property, in order to satisfy Keller factor three, there must be a "direct relationship" between the amount of stormwater discharged from a property and the amount of impervious area on that property. Beatty, 867 S.W.2d at 211.

113. The record demonstrates that there is not a direct relationship between the amount of impervious area on a property and stormwater runoff (or service). Plaintiffs' experts in the fields of hydrology and hydraulics evaluated the relationship between impervious area and runoff, using both hypothetical figures and actual data gathered during a field study of properties throughout MSD's service area, and opined that not only is there not a "direct relationship" between impervious area and runoff, but there is little, if any, relationship between the two. The relationship here is between impervious area and fee, not service and fee.

114. The testimony of MSD's witnesses demonstrates that its Stormwater User Charge bears no relation to the level of services it actually provides to an individual property owner, but rather is simply a way of apportioning its total stormwater costs amongst its fee payers.

115. Where a fee is not based on a fee payer's "actual use," but instead is based on an average or estimated use of governmental services by a fee payer, the fee is subject to the Hancock Amendment because it does **not** bear a direct relationship to the level of services a fee payer actually receives from the political subdivision. Id.; see also Feese, 893 S.W.2d at 812.

116. Here, the record demonstrates that there is not a direct relationship between the level of stormwater services a fee payer actually receives from MSD and the Stormwater User Charge billed to the fee payer because (i) the Stormwater User Charge is not based on an individual's actual use of MSD's services (e.g., how much runoff the individual's property sends to MSD's system), and (ii) there is not a direct relationship between the amount of impervious area on a property and its stormwater runoff. This Court resolves the third Keller test in favor of the Plaintiffs.

D. Keller Factor 4

117. The fourth Keller inquiry is: "Is the government providing a service or good?" Keller, 820 S.W.2d at 304 n.10. "If the government is providing a good or a service, or permission to use government property, the fee is less likely to be subject to the Hancock Amendment. If there is no good or service being provided, or someone unconnected with the government is providing the good or service, then any charge required by and paid to a local government is probably subject to the Hancock Amendment." Id. This question is not answered by simply looking at whether there is government involvement in the service, because there is always government involvement. Rather, courts scrutinize whether a "service," as such, is actually being provided.

118. In Building Owners & Managers Ass'n of Greater Kansas City v. City of Kansas City, 231 S.W.3d 208 (Mo. Ct. App. W.D. 2007), the plaintiffs challenged three Kansas City ordinances that required businesses and multifamily dwellings to pay fees for annual fire

inspection certificates. Prior to the enactment of those ordinances, annual inspections were not mandatory, and the City had enforced the fire code by performing inspections only when complaints were received. These inspections were funded by general revenues. If the inspection revealed fire code violations, the property owner had an opportunity to cure the deficiency, and if uncured, the City Fire Department could issue a municipal citation. In analyzing Keller factor four, the Court of Appeals held that the "history of the fire inspection program indicates the City was not delivering a good or service when it took steps to enforce the fire code. With the passage of the three ordinances, the City sought to convert this enforcement activity into a service by requiring annual inspections and charging a fee for an inspection certificate." Id. at 214. The Court further stated that "[t]hese revenue-driven policy changes did not alter the fundamental purpose of the inspection program and the nature of the City's duty to ensure compliance with the fire code." Id. The Court, therefore, held that "[b]ecause the inspection program does not constitute a service to property owners, the fees related thereto are likely a violation of the Hancock Amendment."

119. Here, the record demonstrates that the Stormwater User Charge funds MSD's maintenance and operation of its stormwater system, and also funds MSD's compliance with applicable regulations and provision of education to District property owners regarding the mandates of the Clean Water Act. Prior to MSD's enactment of the Stormwater Ordinances in 2007, MSD performed these same activities, and these activities were funded by taxes under a stormwater funding program that had been fully approved by the voters. In 2007, when MSD desired to raise significant additional revenue for stormwater purposes without voter approval, it simply recast these activities as "services" for which it contends it can now charge "user fees" not subject to the Hancock Amendment. MSD offered no testimony at trial that the nature of its stormwater services has changed at all since it operated under its prior funding program. As the

Court of Appeals recognized in Building Owners, the simple fact that MSD has made these "revenue-driven policy changes" does not suddenly convert MSD's stormwater activities into "services" for purposes of the fourth Keller inquiry. This supports a finding in favor of Plaintiffs on the fourth Keller factor.

120. In addition, certain ratepayers are being charged Stormwater User Charges for services they do not receive. For example, individuals who decide to develop their properties are mandated by MSD to take measures to ensure that their stormwater runoff after development is no different than it was before development. But MSD's Stormwater Ordinances do **not** provide any credit on the Stormwater User Charge to such property owner for maintaining pre-development runoff conditions. Because MSD is not delivering a measurable service in connection with its Stormwater User Charge now billed to such individuals, this Court finds in favor of Plaintiffs on Keller factor four.

E. Keller Factor 5

121. The fifth Keller inquiry is: "Has the activity historically and exclusively been provided by the government?" Keller, 820 S.W.2d at 304 n.10. "If the government has historically and exclusively provided the good, service, permission or activity, the fee is likely subject to the Hancock Amendment. If the government has not historically and exclusively provided the good, service, permission or activity, then any charge is probably not subject to the Hancock Amendment." Id.

122. The record demonstrates that MSD has historically and exclusively provided stormwater services in the St. Louis area. There was no evidence adduced by MSD that any private entities have historically supplied stormwater services in St. Louis (or anywhere in Missouri, for that matter) to paying customers.

123. The Missouri Supreme Court has recognized that "[p]roviding for drainage . . . is a governmental function. . . ." State ex rel. Dalton v. Metropolitan St. Louis Sewer Dist., 365 Mo. 1, 9 (Mo. 1955). Therefore, this Court resolves this fifth factor in favor of Plaintiffs.

124. As all five Keller factors weigh in favor of the Plaintiffs' position, this Court concludes that the Stormwater User Charge imposed by MSD pursuant to the Stormwater Ordinances is subject to the Hancock Amendment.

II. Violations of Article X, Section 22(a) of the Hancock Amendment

125. Article X, Section 22(a) of the Hancock Amendment provides that "[c]ounties and other political subdivisions are hereby prohibited from levying any [new or increased] tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution when this section is adopted . . . without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon".

126. MSD's Stormwater User Charge constitutes a new "tax or fee" imposed without the approval of a qualified majority of voters in violation of Article X, Section 22(a) of the Hancock Amendment, because MSD replaced its prior stormwater funding program (which was completely funded by taxes approved by the voters) with this new Stormwater User Charge without submitting the Stormwater User Charge to the District voters. Thus, the Stormwater User Charge is a **new** charge "not authorized by law, charter or self-enforcing provision[s] of the constitution" when the Hancock Amendment was adopted in 1980.

127. The Stormwater User Charge also is an "increased tax" because it resulted in a substantial revenue increase to MSD. During its first fiscal year of assessment, the new Stormwater User Charge doubled the annual revenue to MSD under the prior stormwater funding program, and by 2014, the Stormwater User Charge will yield four times the amount of revenue MSD received under the prior program. Therefore, the Stormwater User Charge also is an

"increas[e] [in] the current levy of an existing [charge] above that current levy authorized by law or charter" when the Hancock Amendment was adopted in 1980.

128. Article X, Section 22(a) of the Hancock Amendment also provides that "[i]f the definition of the base of an existing tax, license or fee[ ] is broadened, the maximum authorized current levy of taxation on the new base in each county or other political subdivision shall be reduced to yield the same estimated gross revenue as on the prior base".

129. MSD's Stormwater User Charge unlawfully broadens the base of an existing "tax or fee" in violation of Article X, Section 22(a), because none of the charges under MSD's prior stormwater funding program were billed to any tax-exempt entities; yet the Stormwater User Charges are billed to **all** tax-exempt entities. That fact, coupled with the substantial increase in revenue to MSD under the Stormwater User Charge, demonstrates that the Stormwater User Charge is a broadening of the base of an existing charge without a reduction in revenue to "yield the same estimated gross revenue as on the prior base."

130. This Court finds and declares that MSD's Stormwater Ordinances (and Stormwater User Charges imposed thereunder) violate Article X, Section 22(a) of the Hancock Amendment to the Missouri Constitution.

131. Unconstitutional laws are void *ab initio*. State ex rel. Bloomquist v. Schneider, 244 S.W.3d 139, 143-144 (Mo. banc 2008); Armco Steel v. City of Kansas City, 883 S.W.2d 3, 7 (Mo. banc 1994); Levinson v. City of Kansas City, 43 S.W.3d 312, 320 (Mo. Ct. App. 2001). An unconstitutional ordinance is no law and confers no rights. Id. This is true from the date of its enactment, and not merely from the date of the decision so branding it. Id. Therefore, this Court finds that the Stormwater Ordinances were void from the date of their enactment.

III. MSD's Affirmative Defenses

132. MSD did not address any of its affirmative defenses in its Trial Brief, and did not adduce any evidence at trial supporting such defenses. Therefore, MSD's affirmative defenses are deemed abandoned and are hereby denied.

IV. Attorneys' Fees

133. Article X, Section 23 of the Hancock Amendment to the Missouri Constitution provides:

> Notwithstanding other provisions of this constitution or other law, any taxpayer of the state, county, or other political subdivision shall have standing to bring suit in a circuit court of proper venue and additionally, when the state is involved, in the Missouri supreme court, to enforce the provisions of sections 16 through 22, inclusive, of this article and, if the suit is sustained, shall receive from the applicable unit of government his costs, including reasonable attorneys' fees incurred in maintaining such suit.

134. As "taxpayers" whose lawsuit under Article X, Section 22(a) of the Hancock Amendment has been sustained by this Court, this Court finds that Plaintiffs and the Hancock Class are entitled to recover their reasonable attorneys' fees and litigation expenses pursuant to Article X, Section 23 of the Hancock Amendment.

JUDGMENT AND DECREE

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is hereby Ordered, Adjudged and Decreed:

1. Judgment is entered in favor of Plaintiffs and the Hancock Class on their claims in the Second Amended Petition (i) seeking a declaration that the Stormwater Ordinances are invalid and unconstitutional as enacted and applied because they violate the Hancock Amendment, Mo. Const. art. X, §§ 16-22

2. MSD's Stormwater Ordinances and Stormwater User Charges imposed thereunder violate Article X, Section 22(a) of the Hancock Amendment, because they constitute

new and/or increased "taxes or fees" imposed without the approval of a majority of qualified voters in the District.

3. MSD's Stormwater Ordinances and Stormwater User Charges imposed thereunder also violate Article X, Section 22(a) of the Hancock Amendment because they constitute an unlawful broadening of the base of an existing "tax or fee" without a corresponding reduction in the rate so that no additional revenues are generated by the tax or fee.

4. Plaintiff's request that MSD be enjoined from further enforcement of the Stormwater Ordinances and from further collection of the Stormwater User Charge unless and until the Stormwater User Charge is approved by a majority of the qualified voters of the District, is passed for consideration at the second phase of this trial.

5. Plaintiff's request that MSD be enjoined from spending the Stormwater User Charge funds it already has unlawfully collected, is passed for consideration at the second phase of this trial.

6. Costs are taxed against Defendant.

7. Plaintiffs and the Hancock Class are entitled to recovery of their attorneys' fees and litigation expenses under the Hancock Amendment, Article X, Section 23 of the Missouri Constitution.

8. Pursuant to this Court's October 8, 2009 Order bifurcating the proceedings, Plaintiffs' claims against MSD in the Second Amended Petition for a refund of all amounts collected by MSD under its unconstitutional Stormwater Ordinances shall now proceed to an adjudication on the merits.

9. The parties shall appear at a date to be determined upon conclusion of this matter for hearing and presentation of evidence regarding the amount of attorneys' fees and expenses to

be awarded Plaintiffs and the Class, and for scheduling of the second phase of trial and any related motions.

SO ORDERED:

Dan Dildine

Hon. Dan Dildine, Circuit Judge

Dated: July 9, 2010

Counsel notified.